

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:   
SOKOLOW, et al, : 04-CV-397 (GBD)  
:   
Plaintiffs, : October 15, 2013  
:   
v. : 500 Pearl Street  
: New York, New York  
PALESTINE LIBERATION ORGANIZATION, et al, :  
:   
Defendants. :  
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good afternoon. This is Judge Ellis.  
2 Can I have your appearances beginning with the plaintiffs?

3 MR. TOLCHIN: Good afternoon, Your Honor. For the  
4 plaintiff, Robert Tolchin from the Berkman Law Office and with  
5 me is --

6 MR. YALOWITZ: Your Honor, Kent Yalowitz and  
7 Carmella Romeo from Arnold & Porter.

8 MR. HILL: Good afternoon, Your Honor. It's Brian  
9 Hill from Miller & Chevalier for the defendants.

10 THE COURT: This conference in Sokolow v. Palestine  
11 Liberation Organization, et al., 04-CV-397 is taking place on  
12 Tuesday, October 15<sup>th</sup> at approximately 3:35 p.m. This  
13 conference concerns an application by defense counsel not  
14 related to the merits of the case but -- well, I guess  
15 everything is related to the merits of the case but  
16 specifically seeking sanctions against plaintiff's counsel for  
17 using a document which was the subject of a protective order  
18 in this case. It is a letter from Mr. Hill dated October 4,  
19 2013.

20 I also understand that there is a pending motion by  
21 Mr. Tolchin to intervene by the Gilmore plaintiffs related to  
22 the -- what appears to be the subject. Am I right on the  
23 facts?

24 MR. HILL: That is correct, Your Honor.

25 THE COURT: Now, as I indicated to my law clerk, I

1 wanted to make sure the facts to determine what would be the  
2 next step in terms of the question of whether or not sanctions  
3 are appropriate.

4 Let me begin by asking Mr. Tolchin. I gather based  
5 upon the correspondence that's gone back and forth that there  
6 is not dispute that we are talking about a document in which  
7 the defendants had designated as confidential.

8 MR. TOLCHIN: There is no dispute and to be precise,  
9 Your Honor, and I hope I don't sound [inaudible], there is no  
10 dispute that they're stamped confidential at the bottom of the  
11 document but they did not properly according to the protective  
12 order, they did not properly designate what portion of the  
13 document they allegedly contend as confidential which is  
14 required by our confidentiality order in this case. You're  
15 not allowed to designate a whole document. You're supposed to  
16 designate only the portion of the documents that contains  
17 specified forms of confidential information.

18 THE COURT: I gathered that from your response. But  
19 I also want to establish from a factual point of view your  
20 position that they had not properly designated it according to  
21 the protective order. Did you indicate that to Mr. Hill?

22 MR. TOLCHIN: That it was not properly designated?

23 THE COURT: Correct.

24 MR. TOLCHIN: Yes, the issue was -- that issue was  
25 raised with Mr. Hill but -- and I understand where Your Honor

1 is going and I would just point out that where you're starting  
2 from, Your Honor, isn't -- well, bluntly it's not where I  
3 would start from. The first question is did we designate --  
4 did we reveal the content of these documents.

5 I mean just to give an analogy and I understand that  
6 all analogies only go so far, but for whatever it's worth if I  
7 have your social security card and it's been designated as  
8 confidential and then I hear you come in and say your social  
9 security number is such and such and I say well, I have the  
10 social security card and I can't tell you what it says but I  
11 can tell you that's not a number. That's more akin -- maybe  
12 not precisely but more akin to what happened here. We did not  
13 reveal the content of the document. We simply said we have a  
14 document that lists the promotion history of this individual.

15 So, yes, to the extent we said what topic the  
16 document covers, we talked about it, but we did not reveal the  
17 contents of the document and quite frankly in the Gilmore case  
18 they produced -- these documents that we're talking about are  
19 administrative orders. I don't know if Your Honor has the  
20 motion that was filed in the Gilmore case handy but the doc --  
21 the very documents we're talking about are attached as Exhibit  
22 A to that, as part of Exhibit A to that --

23 THE COURT: Mr. Tolchin, before you continue, again I  
24 understand that you might not start where I would start but I  
25 do get to start where I want to start. The reason I'm asking

1 factually is because I understand that you have disagreement  
2 and there might be disagreement about the protective order.  
3 There might be disagreement about how properly the parties  
4 reacted to the protective order. From my point of view the  
5 issue is if there are disagreements about the protective order  
6 which the parties got the court involved in such that they're  
7 not able to resolve it, the question is whether or not your  
8 approach to what you consider to be Mr. Hill's proper or  
9 improper designation is an appropriate way to deal with your  
10 disagreement about either whether or not he properly  
11 designated it as confidential or whether or not you had  
12 revealed the content of the document by indicating that some  
13 other thing was inconsistent with what was in the document.

14 I'm concerned because if the question before me is  
15 whether or not somebody should be sanctioned, I'm concerned  
16 with more about how they approached this than arguing the  
17 merits of what's in the protective order. So that, for  
18 example, if I had -- if I had an order that said that you had  
19 to do something on the next business day and you thought the  
20 next business day was something different I would expect you  
21 to clear it up rather than to file it a day after the next day  
22 saying well, he could not have met this day because that was a  
23 business day in the state. Do you understand my position?

24 MR. TOLCHIN: Yes, I do, Your Honor.

25 THE COURT: And this is more a question of whether or

1 not -- even if you -- even if everything that you said is  
2 right about the designation whether or not when you have a  
3 court order the appropriate approach is to go ahead and file  
4 something which -- am I to understand that you didn't think  
5 that this was an issue and that's why you felt safe in doing  
6 what you did?

7 MR. TOLCHIN: We did not file the document. We had  
8 originally wanted to file the actual document in the Gilmore  
9 case but because of the disputed confidentiality designation  
10 we did not file the document and we only gave the most  
11 circumspect reference to it in a way that we felt did not  
12 violate the protective order.

13 THE COURT: So I --

14 MR. TOLCHIN: So we gave respect to the protective  
15 order by opting not to disclose the document.

16 THE COURT: So I understand your answer to be you  
17 understood there could be an issue and rather than clearing it  
18 up you decided that you had sufficiently avoided violating the  
19 order.

20 MR. TOLCHIN: I suppose you could put it that way,  
21 yes.

22 THE COURT: If that's the way you approached this I'm  
23 just -- I'm asking whether or not you believe that that's an  
24 appropriate way to approach a court order.

25 MR. TOLCHIN: I don't think we violated the court

1 order. We did not disclose the documents. We did not quote  
2 from the document.

3 THE COURT: Mr. Tolchin --

4 MR. TOLCHIN: And we did not --

5 THE COURT: Mr. Tolchin, let me be clear. I  
6 understand that you believe that you did not violate the  
7 protective order. My question is I gather that you had  
8 sufficient concern about the impact of the protective order to  
9 take your efforts, what you believe necessary to avoid  
10 violating the protective order and I take it your position is  
11 that that was the appropriate way to deal with what came --  
12 what appeared to be a dilemma in terms of how you would  
13 approach the protective order.

14 MR. TOLCHIN: I would say yes, Your Honor. In the  
15 original drafting of my declaration, it's quoted from the  
16 documents so then we looked at it and we said hey, we can't  
17 quote from these documents because they're subject to a  
18 confidentiality order and we said well, are we barred from  
19 simply referring from them and we thought about it and we  
20 looked at the order. I'll concede, I'll admit that one of the  
21 things that we thought about was that these documents were  
22 never -- should have been designated as confidential. They  
23 were not -- similar documents of the same type were not  
24 designated as confidential in the Gilmore case and -- which I  
25 can show Your Honor, and they seem to be public documents

1 anyway. They're administrative orders of the Palestinian  
2 government.

3 THE COURT: Before you proceed, Mr. Tolchin. I can  
4 assure you it would not be the first time that something was  
5 designated confidential that the other party determined that  
6 it should not be classified as confidential and it wouldn't be  
7 the first time that if it were brought up the court would  
8 agree with the party challenging the designation. This is  
9 pretty standard stuff with confidentiality orders and it's  
10 not -- it's actually not that unusual for somebody pursuant to  
11 the protective order that's been entered to challenge the  
12 confidentiality and have the court agree with them. I don't  
13 see that as the issue here.

14 Indeed your recitation of your position reminds me  
15 of the statement that it's better to seek forgiveness than to  
16 seek permission because frankly if you had some questions  
17 about whether or not this was confidential I'm still not  
18 understanding why you would not have challenged the  
19 confidentiality of it or if there was some question about the  
20 scope of what you could reveal, whether or not you would not  
21 have [inaudible] because it seemed to me ripe for discussion  
22 with the court and I don't recall any assertion that the court  
23 was unavailable to determine whether or not your approach  
24 would have violated the order.

25 Understand at this point you're dealing with



1 violating my order, not your interpretation of what the order  
2 is. Was there some reason why you did not bring this matter  
3 to the court?

4 MR. TOLCHIN: All I can say, Your Honor, is that we  
5 felt that it was not necessary because we felt that we had  
6 sufficiently -- that what we put in the declaration was not a  
7 violation of the order so that rather than burden the court  
8 with an application to use the entire document at that time we  
9 simply avoided the need to do so by we felt not violating the  
10 order.

11 Now, obviously I understand that Your Honor's  
12 interpretation of the order is what controls but we felt that  
13 we were not violating the order and that's why we did what we  
14 did.

15 THE COURT: Okay. Let me also make it clear -- and  
16 that's why I asked you why you didn't bring it to the court  
17 because if you -- if you were right you would have gotten to  
18 use the document and there would be no harm. If your  
19 interpretation is wrong then the result is you have revealed  
20 documents which would have been deemed confidential. The  
21 balancing of the equities in the status quo -- you chose to  
22 act in a way that created more of a conflict. You understand  
23 that, don't you?

24 MR. TOLCHIN: I understand that, Your Honor. I can  
25 simply explain that this was one document. This is by way of

1 explanation only. It doesn't necessarily excuse anything but  
2 the document was one among a great many exhibits to papers  
3 that were due in the Gilmore case and with time running short  
4 and many things to do, all of which take a lot of time, we  
5 said that -- we felt that the most expedient thing to do was  
6 to remove the specific quotations and keep it in a way that we  
7 felt did not reveal so much that it would violate the  
8 confidentiality order.

9 THE COURT: I'm --

10 MR. TOLCHIN: I don't know -- medical records, for  
11 example, are frequently designated confidential and to say I  
12 have the records of so and so's treatment, I don't think  
13 saying that you -- a general description of what you have  
14 without revealing the confidential information -- we felt that  
15 that was sufficient particularly given Paragraph 2A of the  
16 confidentiality order which provides a very limited, very  
17 limited list of types of information that are allowed to be  
18 designated as confidential in this case and very little or  
19 none of what is in the documents even arguably falls within  
20 the category in Paragraph 2A of the protective order. And  
21 there's no trade secrets. There's no personal private medical  
22 information. There's no addresses of plaintiffs. The only  
23 thing that defendants point to is personal private employment  
24 information that there isn't even anything in these documents  
25 which comprises personal private employment information.

1 THE COURT: Again --

2 MR. TOLCHIN: The fact that these --

3 THE COURT: Mr. Tolchin, again, I think you're not  
4 focusing on the issue, and that is if you believe that  
5 something should not be confidential then there's a procedure  
6 having it -- having the confidential designation taken off.  
7 If I understand what you -- you're arguing basically that  
8 if -- basically if it looks like a duck, quacks like a duck  
9 and walks like a duck it's a duck so I don't have to worry  
10 about what the confidentiality agreement says. I mean if  
11 that's the position you're going to take -- what's the import  
12 of the confidentiality agreement?

13 MR. TOLCHIN: I'm not saying that, Your Honor. I  
14 think that's an unfair --

15 THE COURT: Did Mr. Hill take the same approach in  
16 terms of anything that -- if he disagrees with your  
17 designation as something as confidential, would he be able to  
18 reveal it if he disagrees with it and then --

19 MR. TOLCHIN: No, he shouldn't, Your Honor, but what  
20 we did was we tried not to reveal it. We tried to submit what  
21 we submitted in Gilmore in a way that we felt did not reveal  
22 any type of confidential information that is protected by  
23 Paragraph 2A of the confidentiality order in this case. We  
24 deliberately rephrased the affidavit so -- or the declaration  
25 so that it would not reveal any such information.

1 I'm pointing out how it's not confidential  
2 information in the first place only as a secondary point. The  
3 first thing we did is we said -- we didn't arrogate to  
4 ourselves and said well, we're not -- we're going to disregard  
5 this letter and reveal the information because we think it  
6 shouldn't have been designated. We didn't do that. We knew  
7 we couldn't do that and we said to ourselves we can't do that.  
8 So we phrased the affidavit in a way that or the declaration  
9 in a way that did not reveal any sort of confidential  
10 information within the scope of Paragraph 2A of our  
11 confidentiality order.

12 So we did not mean to act, and I don't think we did  
13 act in a way that arrogated to ourselves the right to be  
14 judge, jury and executioner. We tried to comply with the  
15 order. I believe we did comply with the confidentiality order  
16 and that is a completely separate point from the separate  
17 argument that this document should never have been designated  
18 as confidential in the first place.

19 THE COURT: But isn't it a fact that to the extent  
20 that the document was designated confidential and was not  
21 otherwise redacted the confidentiality order indicate that the  
22 document is confidential?

23 MR. TOLCHIN: Well, I don't read it that way, Your  
24 Honor, because the confidentiality order in Paragraph 2A says  
25 only those portions of any discovery material that -- and then

1 there's a list of criteria containing or are derived from  
2 trade secrets is one and then -- I'm summarizing. Contained  
3 or derived from personal private medical information is  
4 another and the third and final one is contained or relate to  
5 the addresses of the plaintiffs -- I'm sorry, there are four.  
6 The fourth and final is contained or relate to personal  
7 private financial or employment information.

8           So those are the only types of information that may  
9 be designated as confidential under this protective order and  
10 nothing that I wrote in my declaration reveals any of those  
11 categories of information.

12           THE COURT: That's argumentative though because from  
13 your description of it it's a question of whether or not the  
14 employment information is confidential, not whether or not it  
15 was employment information.

16           MR. TOLCHIN: Personal private employment  
17 information. That's what it has to be. Personal private  
18 employment information.

19           THE COURT: That's not otherwise defined, is it?

20           MR. TOLCHIN: No, it's not but the reason that we  
21 felt very confident that nothing I said was personal private  
22 employment information is I said that the documents -- you may  
23 argue that -- you may say that the documents show or that my  
24 declaration shows that the documents, the confidential  
25 documents show that Abdul Karim Awese was employed but Abdul

1 Karim Awese gave a deposition in the Gilmore case where he  
2 testified that he was employed and gave his rank. So there  
3 was nothing confidential about that fact. It was not personal  
4 private information. He's already testified in a deposition  
5 which was not protected by a protective order.

6 Another illustration, and this is all in my October  
7 14<sup>th</sup> letter, there was a trial in Israel of a fellow named  
8 Nassa Shawish --

9 THE COURT: Okay. Let me -- Mr. Tolchin, let me  
10 again be clear. If you -- if you make this argument in saying  
11 that you should be able to reveal his employment -- let's say  
12 you call the court and you say to the court Judge, this  
13 document is marked confidential, it's got this person's  
14 employment information in it, it's clearly not confidential  
15 because it was revealed in a deposition, we don't think it  
16 should be -- and I say well, that sounds reasonable. What do  
17 you have to say, Mr. Hill. And he makes an argument and I  
18 rule on it. That's like a five minute argument with the  
19 court. I'm not sure what -- you understand that what you're  
20 doing is you get the double edged sword.

21 To the extent that you have stronger arguments about  
22 lack of confidentiality that undermines the notion that this  
23 would burden the court or anyone else because it would have  
24 been so straightforward. Are you not suggesting that if you  
25 were to make this argument to the court that there would be

1 any difficulty ruling on it?

2 MR. TOLCHIN: No, Your Honor. I'm suggesting that we  
3 were -- frankly we were running out of time and rather than --  
4 obviously we would prefer to use the document itself instead  
5 of a somewhat wishy-washy illusion to the document. Obviously  
6 it's better to use the document itself than a vague general  
7 statement about the document in a lawyer's affidavit but we  
8 decided that with all the issues we had to deal with and with  
9 our resources that we had available that rather than fighting  
10 -- we have to choose our battles and rather than fighting to  
11 get this document on confidentialitied [sic] -- undesignated  
12 in time to make our submission in the Gilmore case we decided  
13 to just remove anything that is confidential and submit it in  
14 a water downed form so as to remain in compliance with the  
15 confidentiality order in the Sokolow case.

16 THE COURT: Why were you running out of time? What  
17 was that all about?

18 MR. TOLCHIN: We had summary judgment papers due in  
19 the Gilmore case. I mean that's what this all comes down to.  
20 This has to do --

21 THE COURT: Did the court give you an abbreviated  
22 time to submit those papers?

23 MR. TOLCHIN: All -- I suppose by definition all  
24 briefing schedules are abbreviated. Is Your Honor going to  
25 say -- is Your Honor going to ask me next why we didn't think

1 of this issue on the first day that we had to draft the  
2 summary judgment motion? We didn't. We were dealing with it  
3 near the end and rather than -- rather than raising the issue  
4 with Your Honor and leading and deferring and writing to Your  
5 Honor and waiting for the responsive letter and setting up a  
6 conference we would have been out of time. So we just removed  
7 the -- we removed the document. We did not use the document  
8 because we realized we couldn't. We thought -- I can't say  
9 this strongly enough. We did what we did in order to remain  
10 in compliance with the protective order.

11 Now, at all times when you're governed by a  
12 protective order you have to make judgment calls about whether  
13 -- can I show documents to a translator, can I give the  
14 documents to an outside copy service. I have to look at the  
15 order and decide whether it's allowed or not and in this case  
16 we looked at the order and we felt that what we did was  
17 allowed. I understand if you're -- Your Honor is the ultimate  
18 arbiter on that but we did what we did in order to comply with  
19 the order and we believe we have complied with the order. And  
20 I'm repeating myself.

21 THE COURT: Again, it appears that you seem to assert  
22 that you were under some time constraint that did not allow  
23 you to raise the issue with the court. Have there been issues  
24 here that you have had difficulty raising with the court  
25 without it taking that much time?



1 MR. TOLCHIN: Everything takes time, Your Honor, and  
2 I think you may be overstating what I said. I know Your Honor  
3 has been on my side of the bar. I know that you've litigated  
4 cases and you -- you need to -- you always need to allocate  
5 your time and resources and it's not that we decided -- I  
6 can't say this strongly enough. It's not that we decided to  
7 violate the confidentiality order because we ran out of time.  
8 We said no, we're going to submit something in Gilmore which  
9 is second best rather than spend time which we didn't have at  
10 that point to seek to undesignate it. So rather than giving  
11 in to the Gilmore court something that we could not give  
12 because of the confidentiality designation we simply did not  
13 give it in and I don't believe we violated the order.

14 Separate from that I would say that the defendants  
15 violated the order by designating this document in the first  
16 place but I understand that's a separate point.

17 THE COURT: Mr. Hill, the question I have for you is  
18 this. It does seem we're dealing with two separate issues.  
19 That is one, the procedure that Mr. Tolchin used whether or  
20 not it is sanctionable and secondly, if I agree -- whether or  
21 not I agree with him using the improper procedure, whether or  
22 not the appropriate response from this court is to have the  
23 documents removed from the Gilmore case assume that I had the  
24 authority and/or the power to make that happen, given that one  
25 of the considerations the court would have in that regard

1 would not -- we've moved into the question of whether or not  
2 it should have been designated confidential and therefore it  
3 would take extraordinary -- from my point of view an  
4 extraordinary intervention in order to do that. What -- the  
5 arguments that Mr. Tolchin made, as I said dealing separately  
6 with the question of how much harm was created by his alleged  
7 breach, what is your -- what are your arguments concerning the  
8 confidential nature of these documents?

9 MR. HILL: Yes, Your Honor. Well, let me address all  
10 of those if you don't mind and let me give Your Honor a couple  
11 of additional data points which Mr. Tolchin did not give you.

12 You've asked whether there was an abbreviated  
13 briefing schedule in the Gilmore matter for summary judgment.  
14 We filed the motion for summary judgment in the Gilmore case  
15 in August of 2012. It has been more than a year that that  
16 motion has been on file. The plaintiffs asked for and  
17 received until October 1, 2013 to file their opposition in  
18 that case. So the notion that the plaintiffs ran out of time  
19 seems -- well, I won't characterize it but the notion that --  
20 you had a motion on file for over a year and the opposition  
21 jammed you I think should not be credited by the court.

22 Mr. Tolchin identified this issue in an email he  
23 sent to me on September 9<sup>th</sup> which was 21 days before his brief  
24 was due on October 1<sup>st</sup>. I responded to him on September 12<sup>th</sup>  
25 and I told him that we would not be removing the

1 confidentiality designation for these particular documents.  
2 In that email, which is attached to my letter of October 4<sup>th</sup>,  
3 Mr. Tolchin recognized that he would have to receive leave  
4 from you in order to use that document in the Gilmore case and  
5 I in fact told him in my email of September 9<sup>th</sup> that using that  
6 document in the Gilmore case would violate Paragraph 4 --  
7 Paragraph 4 of the order as Your Honor may have in front of  
8 you says "Confidential discovery materials shall not be used  
9 by any person other than the producing party or non party for  
10 any purpose other than prosecuting, defending, settling,  
11 appealing or enforcing any judgment in the above captioned  
12 action."

13           So if I may suggest to Your Honor, I think the  
14 clearest violation here is of Paragraph 4 itself. The fact  
15 that the document which was designated as confidential was  
16 used in the Gilmore case is [inaudible] a violation of  
17 Paragraph 4 and I told Mr. Tolchin that on September 12<sup>th</sup>. And  
18 he went ahead and indisputably used the document in the  
19 Gilmore case anyway.

20           So setting aside whether or not the content of the  
21 document was violated, was revealed in violation of Paragraph  
22 2B of the order, I think it's indisputable that Paragraph 4 of  
23 the order was used -- was violated just because he used the  
24 document in a case other than this one.

25           So if you move to the next inquiry which is did what

1 he did in his declaration violate Paragraph 2B of the order,  
2 and that's the provision that says "The protections conferred  
3 by this order cover not only confidential discovery material  
4 but also any information copied or extracted therefrom as well  
5 as all copies, excerpts, summaries of compilations thereof."

6 THE COURT: Mr. Hill, let me remind you. I have read  
7 your submission. I understand the arguments and it should be  
8 clear from the tenor of my questions that I appreciate the  
9 import of what Mr. Tolchin did. What I would like from you,  
10 however, is to focus on the issue which I raised because  
11 despite the fact that it's coming in a roundabout way if I'm  
12 going to -- separate and apart from whether or not what Mr.  
13 Tolchin did is sanctionable and what the appropriate sanction  
14 is the question still remains as to what remedy other than  
15 sanctions are appropriate given the documents that are at  
16 issue.

17 MR. HILL: Yes, Your Honor. I'm happy to address the  
18 remedy issue. I apologize. I misunderstood what you wanted  
19 me to do.

20 So in terms of remedies, you clearly have the power  
21 and authority to require the plaintiffs and the plaintiff's  
22 counsel in this case to withdraw the material they filed in  
23 the Gilmore case and to withdraw the material they publicly  
24 filed in this case. It's unquestionable that you have  
25 jurisdiction to enforce your own order and indeed that is why

1 we came to you as opposed to the judge in Gilmore to get the  
2 relief here and I think Judge Kessler may have understandably  
3 said to us why are you coming to me if you think Judge Ellis'  
4 order has been violated. You want to go to Judge Ellis.

5           So I think, Your Honor, there can be no doubt that  
6 you have the jurisdiction to enforce your own order by, among  
7 other things, requiring the parties and their counsel to  
8 comply with the order and to remedy their breach of it by  
9 withdrawing from the public record in the other case the  
10 material that they have filed there in violation of your  
11 order.

12           I would request a further sanction though because I  
13 think that is in effect just a slap on the wrist and to a  
14 certain degree the bell cannot be unrung, Your Honor. Mr.  
15 Tolchin's goal was to in violation of Paragraph 4 tell Judge  
16 Kessler about this material and he has achieved that goal and  
17 if all you do is require him to take it back that doesn't  
18 unring the bell. I think what needs to be done is for the  
19 plaintiffs to suffer a real sanction here and I think the  
20 appropriate one is the one we've suggested in the letter which  
21 you have the authority to do under Rule 16(f) which is to not  
22 allow them to use this material further in this case.

23           As you will remember from our lengthy discussion in  
24 November of 2001 where Mr. Tolchin opposed having any  
25 protective order entered at all you correctly noted that the

1 rationale for these sorts of orders is to allow the parties to  
2 exchange confidential information without having to require  
3 the courts to get involved and whether the information is or  
4 is not relevant to the case.

5           If there had been no protective order in this case I  
6 would have resisted producing these precise documents on the  
7 grounds of their relevance. We didn't have to do that because  
8 there was a protective order. But because we know the  
9 plaintiffs don't honor the order and are prepared to use the  
10 material not only by publicly disclosing it in violation of  
11 the order but to use it in other cases when the order  
12 expressly says they can't do so I would respectfully request  
13 that the court sanction the plaintiffs by not letting them use  
14 this material. They got it --

15           MR. YALOWITZ: Your Honor, Your Honor, this is Kent  
16 Yalowitz. I've been sitting quietly listening to this.

17           MR. HILL: Mr. Yalowitz, may I finish before you  
18 interrupt, please?

19           MR. YALOWITZ: I just ask permission to be heard,  
20 Your Honor.

21           THE COURT: Mr. Yalowitz, Mr. Hill has to finish  
22 first. Mr. Hill, I gather though from what you're saying  
23 though that this -- you don't want what we would do with the  
24 jury and instruct them to disregard it because that can't  
25 happen but you wanted to sanction that has impact on this case

1 and that it's the -- if the sanction having to do with the use  
2 of information in this case and whether or not -- and I take  
3 it though that you're saying that regardless of whether or not  
4 the documents should have been or would have been deemed by  
5 the court to be confidential the violation of the court -- the  
6 protective order require that sanctions without regard to  
7 getting -- the court reaching the issue of what were the  
8 appropriate designation of these documents.

9 MR. HILL: That's correct, Your Honor. As far as the  
10 third point goes, which is were they appropriately designated,  
11 the fact of the matter is the order required us in good faith  
12 to make the designations. We did designate only those  
13 portions, those pages of the documents that contained or  
14 related to personal private financial or employment  
15 information and there is a procedure in the order that Your  
16 Honor entered requiring a party if there is a disagreement to  
17 raise it with the opponent, which Mr. Tolchin did on September  
18 9<sup>th</sup>. I responded on September 12<sup>th</sup> that I would not withdraw  
19 the designation and then he had ten days to come to you and  
20 get relief --

21 THE COURT: Mr. Hill --

22 MR. HILL: -- and he didn't do it.

23 THE COURT: Mr. Hill --

24 MR. HILL: The terms of the order that --

25 THE COURT: If you're not going on the subset I know,

1 you know and I gather that at least someone on the plaintiff's  
2 side understands it. Again, we're talking about what is going  
3 to happen now. I have a good idea of what's already happened  
4 and again I take it your position is that the court need not  
5 reach the question of whether or not your designation of these  
6 documents as confidential was appropriate in view of Mr.  
7 Tolchin jumping the gun and divulging them without resort to  
8 the procedures that were called for in the order.

9 MR. HILL: That's correct, Your Honor. And I guess  
10 I'm making the additional point that under the terms of  
11 Paragraph 14 itself the ten days have run and so as the order  
12 exists it's actually now too late for the plaintiffs to ask  
13 you to change the confidentiality designation. I understand  
14 you can vary your own order but you would now with the party  
15 coming to you with unclean hands be saying not only am I going  
16 to relieve -- now I'm going to not even hold you to the  
17 provision of the order that said you had ten days after  
18 September 12<sup>th</sup> to bring this to my attention.

19 The purpose of that provision is so that these  
20 things don't drag on. If there really is an issue the parties  
21 should bring them to you as you've told us --

22 MR. YALOWITZ: Your Honor, may I now be heard on the  
23 bizarre relief that the defendants are requesting?

24 THE COURT: Mr. Yalowitz, if you interrupt one more  
25 time you won't get to speak. Do you understand?



1 MR. YALOWITZ: Yes, sir.

2 THE COURT: Okay. Mr. Hill.

3 MR. HILL: Yes, Your Honor.

4 THE COURT: So because of the -- as I said, jumping  
5 the gun, and specifically what you want as a sanction is that  
6 -- now, in terms of what was used, are you talking about the  
7 documents, the information or anything related to this  
8 employment?

9 MR. HILL: In terms of relief I would like, Your  
10 Honor?

11 THE COURT: Yes.

12 MR. HILL: Your Honor, the relief I'm asking for is  
13 systematic. We produced the documents that we produced in  
14 this case that we designated as confidential in good faith  
15 with the understanding that the plaintiffs would honor Your  
16 Honor's order and use them only as specified in the order.  
17 That good faith has been breached in our view and we think in  
18 order for there to be a real sanction the plaintiffs need to  
19 lose the benefit of that bargain.

20 We would have litigated the relevance,  
21 responsiveness, probity of all of the documents that we  
22 produced subject to the confidentiality order. We did not do  
23 so because we believed we had an order that was enforceable by  
24 the court that would prevent them from being misused. That  
25 order has proven to be not worth the paper it's printed on and

1 we think the appropriate sanction is that the plaintiffs not  
2 be able to use the materials that we designated as  
3 confidential in this case. I don't see another sanction that  
4 effectively sanctions them. If you just say hey, withdraw  
5 what you -- that you already rang the bell, you make them pay  
6 my fees or something like that, they are --

7 THE COURT: I'm sorry. Just -- I'm still not clear.  
8 Is everything that's been designated as confidential according  
9 to the confidentiality order, not just what's -- what was  
10 disclosed? I just need clarity on what it is that you asked.  
11 Are you still there?

12 MR. TOLCHIN: Bob Tolchin is still here.

13 FEMALE VOICE: Your Honor, this is Ami [inaudible]  
14 for Brian Hill. Brian is calling from overseas. He's taking  
15 depositions in this very matter and I think probably what's  
16 happened is he's gotten disconnected. So --

17 MR. TOLCHIN: He'll call back any second.

18 FEMALE VOICE: I'm sure he'll be calling back in any  
19 second.

20 THE COURT: Okay.

21 [Pause in proceedings.]

22 THE COURT: I assume that he'd know that he's been  
23 disconnected because he won't be -- he won't hear anybody else  
24 speaking although sometimes with lawyers I'm not sure.

25 FEMALE VOICE: Your Honor, may I try to conference

1 him in? There he is.

2 MR. TOLCHIN: Wait, there he is.

3 MR. HILL: Your Honor, I beg your pardon. I lost my  
4 telephone connection here in Jerusalem.

5 THE COURT: Okay. My last question --

6 MR. HILL: Yes, Your Honor.

7 THE COURT: That is it seemed that you were saying  
8 that you want all of the documents that have been marked  
9 confidential not to be able to be used in this litigation or  
10 are we just talking about the documents that you -- that have  
11 been submitted in the Gilmore case in this instance?

12 MR. HILL: Your Honor, I would ask for all the  
13 documents that we have marked. If Your Honor is not willing  
14 to give that sanction I would ask that at a minimum the  
15 particular documents that have been misused here the  
16 plaintiffs not be able to use in this case.

17 THE COURT: Okay. I just wanted to clarify what --  
18 make sure that -- okay. Mr. Yalowitz, you wanted to I assume  
19 weigh in on the sanctions issue. I mean the scope of the  
20 sanction requested by Mr. Hill.

21 MR. YALOWITZ: Well, yes, sir. So I've been listening  
22 to this and it seems to me first of all that any sanctions  
23 that a court enters has to be tailored to fit the  
24 transgression if there was a transgression, and the first  
25 question it seems to me on any sanction is what -- what was

1 the harm and Your Honor's certainly right. It's better to ask  
2 permission than to ask forgiveness but here we're talking  
3 about documents that are highly relevant not only to our case  
4 but they seem to be highly relevant to the Gilmore case too  
5 and documents that really shouldn't be marked as confidential.

6 I can tell you that the cases I understand it is  
7 highly impacted by the fact that these individuals like this  
8 fellow Awese, Awese was a Palestinian police officer. He was  
9 convicted of crimes of terrorism in a court of law and  
10 following his conviction he's remained with the Palestinian  
11 police. He continues to be paid his Palestinian police  
12 officer's salary and indeed he's been promoted. And I can  
13 understand why the defendants don't want the jury in this case  
14 to hear that but the idea that because there was an honest  
15 mistake by counsel that that kind of information would be kept  
16 from the jury would be a terrible, terrible miscarriage of  
17 justice.

18 I'm not saying that we shouldn't have come to you  
19 before. It's obvious that all this could have been avoided  
20 and I can tell you now we're going to go through these  
21 documents and we're going to work through them with the  
22 defendant and we're going to get them de-designated so that we  
23 don't have this problem. But to tell the plaintiffs in this  
24 case or American citizens who lost loved ones in acts of  
25 terrorism that the jury can't hear about this it's just way

1 beyond the pale, Your Honor.

2 THE COURT: Well, I understand the position that  
3 you're taking. I will say this. I think as with any  
4 penalties imposed by the court whether civil or criminal they  
5 ought to be proportionate to the nature of the violation.

6 But that having been said, it appears to me that a  
7 couple of things. One, I agree with Mr. Hill that I certainly  
8 have authority over counsel here but what I was referring to  
9 as extraordinary is to have documents withdrawn from another  
10 case whether or not you should have the power and I have not  
11 been convinced that given the circumstances it is appropriate  
12 to [inaudible] that the documents be withdrawn because I don't  
13 -- I'm not converse with the other case and also unlike the  
14 defendants in this case I think it's always a question of  
15 whether or not documents are relevant and whether or not  
16 they're confidential and I don't have sufficient information  
17 to determine the prejudice to either side with respect to what  
18 the documents mean with respect to those two topics and  
19 therefore whether or not they should not be used. That of  
20 course applies to how they would be used in this case also.

21 However, I think it goes without saying that based  
22 upon my questioning that I strongly disagree with the notion  
23 that, first of all you should be -- nothing -- no action by  
24 the parties should be premised on the notion of the  
25 [inaudible] court work or not bringing problems to the court.

1 Indeed, the case is referred to me for the specific reason of  
2 taking care of those problems and to the extent that lawyers  
3 on either side fail to take advantage of the court's ability  
4 to resolve conflicts that cannot be encouraged and must be  
5 discouraged.

6           That does not mean that the penalties if any that  
7 are imposed should necessarily penalize the parties when it  
8 seems to me that at the -- what is perfectly clear at this  
9 point is that whatever failures of counsel and while in some  
10 instances it makes sense to impute counsel's failures to the  
11 client that seems to me something that the court ought to  
12 weigh in terms of who's the real party that's violated  
13 whatever orders there are and who needs to be punished.

14           I have the submissions by the parties. I don't know  
15 if any of my questions today have caused anyone to believe  
16 that their submissions are incomplete but I will say this.  
17 That if a party fails to take advantage of the court's ability  
18 to resolve disputes there has to be a compelling reason for it  
19 and that compelling reason could be the inability to reach the  
20 court or to get the court's resolution in time. It could be  
21 other exigent circumstances. But failing that you've got to  
22 prove that you made some attempt to get the court involved.

23           So for defendant's benefit I will say that  
24 notwithstanding what I considered to be questionable practices  
25 on the part of the plaintiff, I think that the defendants are

1 overreaching in what they want the court to do based on Mr.  
2 Hill's October 4<sup>th</sup> letter. I will -- if the defendant has some  
3 other sanction it wants to propose or modification of any of  
4 their sanctions they're free to propose that but ultimately  
5 I'm going to review everything that's been submitted to me  
6 including the protective order itself.

7           As to the question of the harm, and I approach this  
8 with some trepidation, I do think that ultimately it is  
9 important where the documents fall both in terms of relevance  
10 and in terms of confidentiality and I don't know that the  
11 parties addressed that issue except in the broadest terms  
12 where the defendant said they acted in good faith and the  
13 plaintiff said obviously they're not confidential. Neither  
14 one of those positions actually help me that much. So if the  
15 parties understand what my position is I will base it on the  
16 record that is before me unless there's something specific  
17 which somebody thinks might aid the court in its  
18 determination.

19           MR. HILL: Well, Your Honor, this is Brian Hill. We  
20 will be opposing the motion to intervene and in that briefing  
21 we can address these issues if that will be of aid to Your  
22 Honor in resolving the question of whether you'll sanction the  
23 plaintiffs in this case.

24           MR. TOLCHIN: Your Honor, this is Bob Tolchin. That  
25 same motion to intervene and the motion to de-designate by the

1 Gilmores may affect the outcome in a practical way. It may  
2 affect the outcome of this application as well.

3 MR. HILL: Your Honor, may I ask that pending the  
4 resolution of this issue that the plaintiffs be required to  
5 remove from the public record at the very least in the Gilmore  
6 case the materials that are the subject of [inaudible].

7 MR. YALOWITZ: By that do you mean ask the clerk to  
8 seal them?

9 THE COURT: I think that's --

10 MR. HILL: At the very least.

11 THE COURT: I think that is what Mr. Hill is asking  
12 and [inaudible] some of the other comments I make that would  
13 seem to be the appropriate way to handle this, Mr. Tolchin.  
14 You can -- I forget the judge's name but I'm sure --

15 MR. HILL: Kessler.

16 THE COURT: You can -- Kessler. Oddly enough the  
17 name of one of my former law clerks.

18 I do think it's appropriate to request that -- while  
19 we can't unring the bell at least until I have determined the  
20 appropriate result from the various applications that it be at  
21 least sealed in that case and indeed I'm not sure why that  
22 wasn't one of the results that was considered here but, Mr.  
23 Tolchin, you are directed to request that they be sealed in  
24 the Gilmore case.

25 MR. HILL: Your Honor, there are a couple of filings



1 in this case that have the same issue. May I ask that you  
2 direct that those be placed under seal in this matter so at  
3 least they won't be publicly available?

4 THE COURT: I thought all the documents that the  
5 parties submitted were under seal. Did I miss --

6 MR. TOLCHIN: He's talking about he letters.

7 THE COURT: Right.

8 MR. TOLCHIN: He's talking about the letters that  
9 we're dealing with right now.

10 THE COURT: Mr. --

11 MR. HILL: And Gilmore's public filing.

12 THE COURT: I thought Mr. Hill's letter was  
13 confidential.

14 MR. TOLCHIN: As to Hill's letter -- my letters were  
15 e-filed and Mr. Gilmore's public filing -- Mr. Gilmore's  
16 filing -- filed the confidential documents under seal.

17 THE COURT: The motion itself doesn't reveal any  
18 confidential information, does it? So the only thing --

19 MR. TOLCHIN: I don't think so.

20 THE COURT: The only thing we're talking about is the  
21 October 10<sup>th</sup> letter?

22 MR. HILL: Actually the October 14<sup>th</sup> letter, Your  
23 Honor, and I think Gilmore's public filing does run afoul of  
24 Paragraph 2B. I emailed Mr. Tolchin about this and asked him  
25 to take appropriate action. He has not yet done so.

1 THE COURT: Okay. Well, if you can tell me which  
2 specific letters should raise questions concerning the  
3 confidentiality we can have those temporarily designated as  
4 confidential in my order.

5 MR. HILL: Yes, Your Honor. It will be Mr. Tolchin's  
6 letter of the 14<sup>th</sup>.

7 THE COURT: Do you have document numbers?

8 MR. HILL: Let me just pull that up, Your Honor.

9 [Pause in proceedings.]

10 MR. HILL: It would be Document 365, Your Honor.

11 THE COURT: We'll have that designated -- we'll have  
12 that temporarily sealed.

13 MR. HILL: And I believe the other one is Document  
14 356 which is the Gilmore's motion to -- the brief in support  
15 of that.

16 THE COURT: And 356, transpose the 5 and the 6.  
17 Anything else?

18 MR. HILL: Nothing from me at this time, Your Honor.

19 THE COURT: I don't have a timetable for this. So I  
20 will tell you it's not imminent, that is it's not going to --  
21 I'm not going to resolve this to [inaudible] because I do want  
22 to consider everything that's been submitted and the arguments  
23 that counsel has made tonight.

24 Is there anything else?

25 MR. HILL: No, Your Honor.

1 MR. YALOWITZ: No, Your Honor. Just thank you  
2 again. I do apologize for being passionate. I just care very  
3 much about being able to present these very important  
4 documents to the jury.

5 THE COURT: I care very much about courtesy  
6 because -- and I know lawyers sometimes want to interrupt but  
7 from me the lawyers who don't know me the implication must be  
8 that they don't think I'm going to give them an opportunity to  
9 state their case and that's -- I hopefully have never been  
10 accused of that.

11 So in any case, I have your position and so we'll  
12 seal those and then if -- I suspect, however, that I may  
13 require a specific submission once I determine what route I'm  
14 going to take so that the parties can address what I'm  
15 considering if it's going to go the sanction route. Thank  
16 you. We're adjourned.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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5 \_\_\_\_\_  
6 Shari Riemer

7 Dated: October 31, 2013  
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